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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DANIEL JOSEPH KORD, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE CONSTITUTIONAL PROTECTIONS OF DUE PROCESS, CONFRONTATION, AND ASSISTANCE OF COUNSEL WERE VIOLATED BY ADMISSION OF IDENTIFICATION TESTIMONY BY WITNESS EDGETON.

II.

WHETHER THE TRIAL COURT'S DENIAL OF DANIEL KORD'S MOTIONS FOR SEVERANCE VIOLATED HIS RIGHT TO A FAIR TRIAL BECAUSE OF THE OVERWHELMING PREJUDICE CAUSED BY THE DISPARITY BETWEEN THE CO-DEFENDANTS DEFENSES AND THE INABILITY OF DANIEL KORD TO CALL HIS CO-DEFENDANT AS A WITNESS.

PARTIES IN PROCEEDINGS BELOW

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

DANIEL JOSEPH KORD, a/k/a
DANIEL KIRKLAND and DANIEL ALLEN

and

THOMAS DAVID MANGUM, a/k/a STEVE NEAL
KIRBY, STEVEN NEAL KIRBY, ALAN HAMBURGER
and THOMAS DAVID RILEY,
Defendants-Appellants.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DANIEL JOSEPH KORD, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PRAYER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May It Please the Court:

The petitioner, Daniel Kord, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, United States of America v. Daniel Joseph Kord, a/k/a Daniel Kirkland and Daniel Allen, and Thomas David Mangum, a/k/a Steve Neil Kirby, Steven Neil Kirby, Alan Hamburger and Thomas David Riley appears at 836 F.2d 368, (7th Cir. 1988).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on January 12, 1988; rehearing was denied in the cause in a corrected order issued on March 14, 1988. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constituion

Amendment (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation.

Amendment (VI)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rule of Criminal Procedure 14

If it appears that a defendant or the

government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT OF THE CASE

Daniel Kord was tried in the United States District Court for the Central of Illinois, by jury, for violation of 18 U.S.C. Section 2113(a). That section makes criminal the taking of United States currency from a savings loan association insured by the Federal Savings and Loan Insurance Corporation, by force, by violence, or intimidation.

Tried with Daniel Kord was Thomas Mangum, who was convicted by the jury not only of the armed robbery count, but also of carrying a firearm during the commission of a crime of violence, in violation of 18 U.S.C. Section 924(c), and possession of a firearm by a convicted felon.

It was evidenced at trial that the federally insured Citizens Savings and Loan Association of Eureka, Illinois was robbed on August 6, 1985, by two men. Throughout the robbery, the faces of the mean were covered by nylon stockings. One man was armed with a shotgun, and both men wore baseball caps and similar brown print shirts. (Vol. I, R. 62, 63-66, 71-78, 90-99; Vol. II, R. 50-54) After securing from tellers of the bank $19,844.00, including bills which had been recorded and kept as "bait" money, the two men fled the Savings and Loan. They were seen by a witness to run through an alley and enter a yellow car with a license plate bearing the numbers and letters of GYI 2448. (Vol. II, R. 63)

Approximately 3 hours after the

robbery a police officer who had been investigating the robbery noted, as he returned to his home, a yellow car and a small brown car at the Enchanted Gardens Trailer Court. Both cars left the trailer court and were followed by the officer. (Vol. II, R. 131-146) The yellow car bore a license plate number of GYI 824. When ultimately stopped and searched by officers, the car was found to contain a shotgun, two print shirts, a ball cap, a nylon mask, and a total of approximately $11,434.00, including some of the "bait" bills. (Vol. II, R. 151-161, 215-218, Vol. III, R. 56-57) Thomas Mangum was a been passenger in the car. (Vol. II, R. 147-148) At trial it was testified that

the driver of the small brown car had been Daniel Kord. (Vol. II, R. 149)

Government witnesses evidenced at trial that Thomas Mangum had been staying at the trailer shared by Daniel Kord and Kord's wife, for a period of time preceeding August 6, 1985. (Vol. II, R. 25-26, 35-36) At approximately 8:45 in the evening of August 6th, the police searched the Kord trailer, in the Enchanted Gardens, and located a grey metal box containing $6,870.00, including some of the "bait" bills. (Vol. II, R. 170-174, 204-208; Vol. III, R. 57)

At approximately 7:00 p.m. on August 6th, Thomas Mangum was interviewed by the police, and gave a statement inculpating

himself and an individual known to him as "John", whom he stated he had just met, in the commission of the robbery. (Vol. III, R. 44-55)

Prior to the commencement of the joint trial of Thomas Mangum and Daniel Kord, counsel for Mr. Kord moved to sever the trial on the grounds that Mr. Kord would be prejudiced by a joint trial with Mr. Mangum. (Vol. I, R. 12-14, 17-18) The motion was denied. (Vol. I, R. 38-39)

In testimony at trial, no witness to the robbery ventured an identification of Daniel Kord as a participant, save Ruthanne Edgeton. She testified that after the men had fled the building, she had glimpsed "the side of" one of the men as he ran

"very quickly" past the teller drive up window. (Vol. I, R. 100) She testified that he was not wearing the mask at that time. (Vol. I, R. 100) She then testified that Daniel Kord "resembles" that man. (Vol. I, R. 100-101) It was learned subsequent to Ms. Edgeton's testimony that, as she waited to testify, she had been placed in front of a window looking into the courtroom. Her view had consisted of the defense table, and she had been asked to make an identification. (Vol. II, R. 112; Vol. III, R. 104) The defense, upon so learning, moved for a mistrial. (Vol. II, R. 112) The court denied the motion, and also denied motion to strike the identification testimony. (Vol. II, R. 120)

On direct appeal before the United

States Court of Appeals for the Seventh Circuit, Daniel Kord challenged the denial of severance and the introduction of the identification testimony, among other issues. The Court of Appeals affirmed his conviction, and he now seeks a Writ of Certiorari from the Court, for review of the case.

REASONS FOR GRANTING THE WRIT

I.

THE CONSTITUTIONAL PROTECTIONS OF DUE PROCESS, CONFRONTATION, AND ASSISTANCE OF COUNSEL WERE VIOLATED BY ADMISSION OF IDENTIFICATION TESTIMONY BY WITNESS EDGETON

Daniel Kord was denied due process of law when identification testimony was obtained by a procedure so unnecessarily suggestive as to give rise to a substantial likelihood of mistaken identification. Ruthanne Edgeton, a bank employee, made an in court identification of Daniel Kord shortly after having her attention directed toward Mr. Kord through a courtroom door. The defense, after learning of this procedure later in the course of trial, moved for mistrial and to strike the

identification testimony. The motions were denied. In ruling in Mr. Kord's direct appeal, the Seventh Circuit held that the identification procedure used by the Government during the trial was unduly suggestive and that the Government's conduct in conducting such a procedure was completely inappropriate.

The Court held, however, that the identification had an independant basis, and was therefore admissible. This holding was contrary to the evidence.

Prior to her introduction on the witness stand, Ruthanne Edgeton, along with three other witnesses, was directed by a law enforcement official to peer into the courtroom, through a window in a courtroom

door. Her view was of the defense table and the judge's bench. She was asked if she could identify anyone as among the persons who robbed the bank.

The suggestivity of asking a witness, shortly before she is to testify, to peer into the courtroom while the defendant sits expectantly with his lawyer is overwhelming. This is exactly the type of unnecessarily suggestive identification procedure that leads to a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977).

The Seventh Circuit properly found the procedure to have been suggestive. The second prong of the inquiry under Manson v.

Brathwaite, focuses on whether the earlier suggestive procedure created "a very substantial likelihood of irreparable misidentification," evaluated in light of the totality of the circumstances. The factors to be considered were set forth by this Court in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972). These factors include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effects of the suggestive evidence itself.

Ruthanne Edgeton had not had sufficient opportunity to view the bank robbers at the time the bank was robbed. During the robbery, the faces of the culprits were masked by nylon stockings. In addition, the men had their backs to Ms. Edgeton. Her sole opportunity for viewing was a profile glimpse of one participant as he ran "quickly" past the drive up teller's window.

The testimony of Ms. Edgeton made apparent that she was not an observant witness. She had told law enforcement agents that both individuals had guns, when only one gun was used in the robbery; she variously testified that the person she saw had light colored hair, dark blonde or

light brown hair. She had described the shirts worn by the robbers as cream colored, which other witnesses attested to brown multicolored shirts. (Vol I R 104, 108, 109) When she was able to see his face she admitted she could only see his profile and not his whole face. Ms. Edgeton testified that her attention was further undermined by her fright at the events. (Vol I R 109-110) See Note, Did Your Eyes Deceive You?, 29 Stan. L. Rev., 969, 979 (1977)(stress significantly decreases ability to perceive). Five months had passed between the crime and the confrontation at the courthouse. At no time in between was this witness asked to view a line up, a show up, or a photo

array. The Seventh Circuit stated in support of its holding on this issue that Ms. Edgeton's identification testimony at trial was not substantially different from her statements on the day of the robbery. Ms. Edgeton had not, however, made any statement on the day of the robbery, or any other day preceding trial, of any resemblance of Daniel Kord to the robber. Indeed, no law enforcement agent testified to any conversation at the robbery scene with this witness. Contrary to the apparent impression of the Seventh Circuit, there was no independant corroborative identification.

This court declared in Moore v. Illinois, 434 U.S. 220, 98 S.Ct. 458

(1977), on remand 577 F.2d 411, certiorari denied 440 U.S. 919, 99 S.Ct. 1242, in which case the rape victim had been called upon to make her first corporeal identification of the defendant as he was led to the bench for his preliminary hearing, that it was "difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case." In the instant case, the peering through a courtroom window at the defense table was clearly as suggestive. The identification was not otherwise independantly reliable. This Court should grant Writ of Certiorari to review the use of the identification

II

THE TRIAL COURT'S DENIAL OF DANIEL KORD'S MOTIONS FOR SEVERANCE VIOLATED HIS RIGHT TO A FAIR TRIAL BECAUSE OF THE OVERWHELMING PREJUDICE CAUSED BY THE DISPARITY BETWEEN THE CO-DEFENDANTS DEFENSES AND THE INABILITY OF DANIEL KORD TO CALL HIS CO-DEFENDANT AS A WITNESS.

Prior to trial both defendants moved for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure. Thus, from the outset the trial court was put on notice of the conflict that existed between the co-defendants. Counsel for Daniel Kord made it clear that the defense at trial would be that Mr. Mangum placed the money in a trailer where Mr. Kord was living. (Vol 1 R 36) As an example of antagonistic defenses the Seventh Circuit

in United States v. Ziperstein, 601 F.2d 281, 285 (7th Cir. 1979) found antagonism in a fact situation where contraband had been possessed, and one defendant could only deny his own possession by attributing possession and consequent guilt to the other. Because of this antagonism between Daniel Kord and Thomas Mangum there should have been a severance. Furthermore, Daniel Kord was denied a fair trial because the court did not grant the severance which would have allowed Daniel Kord to call the co-defendant, Thomas Mangum as his witness.

The relevant factors that the court should have decided at the time of the motion for severance were: 1) Whether the co-defendant's testimony would be

co-defendant's testimony would be exculpatory; 2) Whether the co-defendant would in fact testify; 3) Whether the testimony would bear on the defendant's case. Also, to be considered is the timeliness of the request and the complexi y of the issues. United States v. Harris, 542 F.2d 1283 (7th Cir. 1976)

A motion for severance is addressed to the trial court's sound discretion. Opper v. United States, 348 U.S. 84 (1954) A single joint trial, however desirable from a point of view of efficient and expeditious criminal adjudiation, may not be had at the expense of a defendant's right to a fundamentally fair trial, United States v. Echeles, 352 F.2d 892, 896 (7th

discretion in terms of safe guarding each defendant's rights in such case is necessarily depends on the facts in each particular case. Id. at 897.

Thomas Mangum had exculpatory testimony to provide in the defense of Daniel Kord. While it is true that this evidence did come out a trial through the testimony of an F.B.I. agent in the Government's case, Daniel Kord was not allowed to establish the full benefit of the co-defendant's exculpatory statements. The court did not question the co-defendant as to whether he would actually testify in behalf of Daniel Kord. In fact during the motion to sever, Mangum's attorney invoked the Fifth Amendment privileges as to his

the Fifth Amendment privileges as to his client.

Daniel Kord could not call one of his best witnesses to testify for him, for to do so would violate Fifth Amendment rights of the co-defendant, United States v. Echeles, 352 F.2d 892 (1965). In this case, Rule 14 mandated a severance to protect Daniel Kord from the unfair prejudice of a joint trial.

CONCLUSION

The conviction of Daniel Kord in the District Court for the Central District of Illinois was in violation of constitutional protections. The petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted

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A P P E N D I X

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

United States of America vs.

DANIEL JOSEPH KORD, a/k/a DANIEL KIRKLAND AND DANIEL ALLEN
in custody, Defendant

Docket No. 85-10034-02

In the presence of the attorney for the government the defendant appeared in person on this date, February 20, 1986

With Counsel, Spencer Lee Daniels

There being verdict of Guilty.

Defendant has been convicted as charged of the offense of Robbery of a federally insured savings & loan in violation of title 18, U.S. Code, Section 2113(a)-Count I and Armed robbery of a federally insured bank in violation of title 18, U.S. Code, Section 2113(d)-Count

2 both as stated in the Indictment. Because robbery is a lesser included offense of armed robbery, judgment is entered only on Count 2 (Armed Robbery).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty (20) years on Count 2.

FURTHER ORDERED that defendant is ordered to pay a special assessment of

$50.00 as required by Title 18, U.S. Code, Section 3013.

No fine or restitution is deemed appropriate.

The court orders commitment to the custody of the Attorney General and recommends that defendant serve sentence in a medium security facility.

Entered by U.S. District Judge

S/S Michael M. Mihm
MICHAEL M. MIHM, Date: February 20, 1986

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 86-1329 and 86-1545

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL JOSEPH KORD, a/k/a
DANIEL KIRKLAND and
DANIEL ALLEN,
and
THOMAS DAVID MANGUM, a/k/a
STEVE NEAL KIRBY, STEVEN NEAL
KIRBY, ALLEN HAMBURGER and
THOMAS DAVID RILEY,

Defendants-Appellants.

Appeals from the United States
District Court for the Central
District of Illinois.
No. 85-10034-01-Michael M. Mihm, Judge.

ARGUED SEPTEMBER 12, 1986
DECIDED JANUARY 12, 1988

Before POSNER and FLAUM,
Circuit Judges, and CAMPBELL, Senior
District Judge.

WILLIAM J. CAMPBELL, Senior District Judge.

A jury convicted defendants/appellants Daniel Joseph Kord and Thomas David Mangum of robbery and armed robbery of a federally insured savings and loan in violation of 18 U.S.C. Section 2113(a) and 2113 (d), respectively. Sentences were entered only on the armed robbery convictions, robbery being a lesser included offense of armed robbery. Sentences of twenty years and twenty-five years incarceration were given to Kord and Mangum, respectively, on the armed robbery convictions. The jury also convicted Mangum of carrying a firearm during the commission of a crime of violence in violation of 18 U.S.C. Section

924(c) and possession of a firearm by a convicted felon in violation of 18 U.S.C. App.II Section 1202(a) (repealed). Mangum received a sentence of five years without parole for the carrying of a firearm during the commission of a crime of violence conviction. The sentence runs consecutively with his armed robbery sentence and concurrently with a two year sentence for the possession of a firearm by a convicted felon conviction. As set forth below, we affirm the judgment of the district court.

I.

On August 6, 1985, two masked men robbed the federally insured Citizens Savings and Loan Association of Eureka,

Illinois at approximately 1:30 p.m. They stole $19,844 including "bait" money from the teller drawers. One of the men was print shirt and a baseball cap with a spotted camouflage design imprinted upon it. His accomplice was shorter and wore a similar style shirt and a White Sox baseball cap.1 The "Sox" cap and one nylon-stocking mask were dropped near the door of the savings and loan as the men fled the crime scene.

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1. Mangum is 5'11" and Kord is 5'6". Kord Br. at 14, 17.

Ruthanne Edgeton, a savings consultant for the savings and loan, testified that after the two men left the building she observed an unmasked man as he ran past a driveup teller window. She testified that the man she saw resembled defendant Kord.

Larry Fritz testified that he saw two men running through an alley near the savings and loan soon after the robbery was committed. Fritz was driving near the crime scene and observed the two men flee in a yellow automobile. He wrote down that the yellow vehicle's license plate number closely resembled GYI-2448.

Sergeant Shoemaker of the Eureka Police Department testified that at approximately 4:45 p.m. on August 6, he

drove to the Enchanted Gardens Trailer Court and saw several people standing around two vehicles-a yellow car and another small brown foreign car. The yellow car's trunk was open. Shortly thereafter, the two vehicles left the trailer camp and Sergeant Shoemaker followed them as they drove southbond on Route 117.

Illinois State Police Trooper James Cooper was in uniform and driving an unmarked squad car when he observed both vehicles at an intersection on Route 117 at approximately 5:15 p.m. on August 6. They were only a few miles south of Eureka. Cooper observed the yellow car's license plate number was GYI-824. An individual,

later identified as defendant Mangum, jumped out of the yellow vehicle and went up to the small brown car parked in front. Soon thereafter, Cooper followed both cars into a gas station.

Cooper made eye contact with defendant Kord, the driver of the small brown automobile. At that point, Kord began to drive out of the gas station, motioning toward the state trooper's direction as he passed defendant Mangum. both vehicles left the gas station.

State and local law enforcement officers stopped the yellow automobile in which Mangum was a passenger at approximately 5:45 p.m. The car's owner and driver was Mangum's girlfriend Judy

Sniff. Mangum consented to the search of the vehicle and the officers found: a shotgun; a shirt similar to the one described by witnesses in the savings and loan robbery; a camouflage spotted baseball cap; and $9,404 including "bait" money in the automobile's trunk. Gov't Br. at 6. Mangum also possessed on his person approximately $2,030 which included more "bait" money.

Subsequently, at 8:45 p.m. on August 6, law enforcement officers drove to Kord's residence in the Enchanted Gardens Trailer Court. Kord's wife signed a consent to search form and the officers searched the trailer and her small brown foreign automobile. Kord Br. at 14. The officers

found approximately $6,870 which included "bait" money from the savings and loan robbery. This money was discovered in a small gray metal box in the Kord trailer. Cancelled checks and banking statements of Kord and his wife were also in the box.

Kord's neighbor, Adrien Gazelle, testified that on August 6, 1985, the Kords had three visitors, a couple and a little boy. Gazelle's twelve year old son testified that he saw Mangum leave with Kord in a yellow car between noon and 12:15 p.m. on August 6. The boy saw them return on foot two or three hours later and Mangum left shortly thereafter. Adrien Gazelle testified that both couples left the trailer park in their respective vehicles

at approximately 4:30 p.m.

Gloria Patterson, an acquaintance of the Kord family, testified that she called the Kord residence on August 6 prior to the time of the savings and loan robbery. Mangum's girlfriend, Judy Sniff, answered the telephone.

After Mangum was taken into custody, FBI Agent Leuck interviewed him at the Woodford County Jail on August 6 a approximately 7:00 p.m. Agent Leuck introduced himself and told Mangum that he was under arrest for the robbery of the Citizens Savings and Loan Association of Eureka, Illinois which had occurred earlier that day. The defendant was asked if he could read, write and understand English.

Mangum answered that he could do so. Mangum Br. at 8, 15. Agent Leuck then gave Mangum and Advice of Rights form to read. The defendant took a few minutes to read the form and when asked to sign the form Mangum stated, "No, I never sign anything." Mangum Br. at 9.

At this point, Agent Leuck told the defendant, "We want to make sure that you understand". Leuck went on to caution him, "You have the right to remain silent; anything that you say may be used against you; make sure you understand". The defendant was advised that an attorney would be appointed to represent him, if he could not afford to hire one. Furthermore, Agent Leuck told Mangum, if at any time he

wanted to stop talking, Leuck would stop asking questions. Gov't Br. at 25.

Mangum was asked, "Would you like to go ahead and talk to us without signing the form?" The defendant admits that he replied, "Sure, why not." Mangum Br. at 9.

At that point Mangum gave an oral confession as to his involvement with the savings and loan robbery. In his statement, the defendant said that a person known only to him as "John" helped him commit the robbery. Mangum also confessed that he used the shotgun in the robbery as his accomplice jumped over the counter to get the money. Furthermore, he confessed that they fled the crime scene in a yellow automobile owned by his girlfriend, Judy

Shiff.

Agent Leuck testified that he and other law enforcement officers periodically checked the Kord trailer for several days following the robbery. No one answered the door on these visits. Kord's wife had moved to Bloomington, Illinois. Ultimately on November 14, 1985, Kord surrendered to law enforcement officers in Phoenix, Arizona.

II.

A. Defendant Kord

[1] Defendant Kord raises five arguments on appeal. As a threshold matter, we note that our jurisdiction governing both defendants' appeals is pursuant to 28 U.S.C. Section 1291. Kord's

first argument is that a reasonable jury could not convict him based upon the evidence presented at trial. It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); see also Burks v. United States, 437 U.S. 1, 17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978); and United States v. Brack, 747 F.2d 1142, 1148 (7th Cir. 1984).

Defendant Kord's neighbors testified that they observed Mangum and Kord together

at Kord's residence on August 6, 1985. The defendants were observed leaving Kord's residence in a yellow automobile between noon and 12:15 p.m. The robbery of the Citizens Savings and Loan Association of Eureka, Illinois occurred at approximately 1:30 p.m. There was testimony from a savings and loan employee that one of the robbers resembled Kord. An eye-witness testified that the yellow getaway vehicle's license plate number closely resembled GYI-2448. The license plate number of the yellow automobile owned by Mangum's girlfriend is GYI-824. A Kord family acquaintance testified that Mangum's girlfriend answered the telephone at the Kord residence on August 6.

Furthermore, an Illinois state trooper observed Mangum and Kord together in a gas station a mere few hours after the robbery. Kord made eye contact with the uniformed officer and then motioned to Mangum about the officer's presence. Law enforcement officers stopped Mangum's vehicle shortly thereafter and after obtaining his consent to search the vehicle found a shotgun, $11,434 including "bait" money from the robbery and other incriminating evidence. When officers searched Kord's residence pursuant to the consent of Kord's wife, $6,870 including "bait" money from the robbery was discovered with Kord's personal papers. Kord's wife moved to another town soon after the robbery and Kord turned

himself in three months later in Phoenix, Arizona. We conclude that viewed in the light most favorable to the government, there is substantial evidence to uphold the jury's conviction of Kord.

[2] Kord's next argument is that the trial court erred in admitting evidence of his flight. "It is well-settled in this circuit that 'evidence of flight and concealment is admissible to show consciousness of guilt, as well as guilty itself.'" United States v. Zabic, 745 F.2d 464, 471 (7th Cir. 1984) citing United States v. Solomon, 688 F.2d 1171, 1176 (7th Cir. 1982); and United States v. Jackson, 572 F.2d 636, 639 (7th Cir. 1978). See also United States v.

ewis, 797 F.2d 358, 368 (7th Cir. 1986).

he probative value of flight as

ircumstantial evidence of guilt--

> depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

ackson, 572 F.2d at 639. See also

nited States v. Myers, 550 F.2d 1036,

049 (5th Cir. 1977).

In the present case, the degree of

onfidence with which the Kord jury could

easonably draw inferences from Kord's

ehavior to an ultimate finding of his

uilt is substantial. Neutral witnesses

bserved Kord with co-defendant Mangum mere

hours before and after the robbery at Kord's residence. State Trooper James Cooper observed the defendants in a suspicious two car gas station rendezvous less than an hour before law enforcement officers found a shotgun, "bait" money and other incriminating evidence in Mangum's vehicle and on his person. "Bait" money was also found in Kord's residence on August 6. Kord's wife moved shortly after the robbery and there was no evidence that defendant Kord was ever seen at the Enchanted Gardens Trailer Court residence after August 6. There is evidence, however, that Kord surrendered to police in Phoenix, Arizona on November 14, 1985.

A jury was entitled to consider the

inferences from such an absence and consider its weight to the actual guilt of the defendant as to the crime charged. Defendant Kord had ample opportunity to rebut the government's charges that he was avoiding federal law enforcement officers. We conclude that the trial court's admission of flight evidence regarding Kord was proper.

Kord argues that the trial court erred in admitting Ruthanne Edgeton's identification evidence. At the government's urging, witness Edgeton looked through a courtroom window to see if she could identify either defendant. This was done contrary to a court order barring witnesses during the trial proceeding.

[3,4] The test we must apply to determine if a defendant's procedural due process rights have been violated by an unconstitutionally suggestive identification procedure is a well settled two-part inquiry. United States ex rel. Kosik v. Napoli, 814 F.2d 1151, 1155 (7th Cir. 1987). First, we must determine if the procedures used at the federal district court below were unduly suggestive. Second, if the procedures were unduly suggestive we must determine if an identification is so unreliable under the totality of the circumstances that it creates a very substantial likelihood of irreparable misidentification. Kosik, 814 F.2d at 1155; Manson v. Braithwaite, 432

U.S. 98, 109-14, 97 S.Ct. 2243, 2250-53, 53 L.Ed.2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 198-99, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972). We believe the government's conduct below was inappropriate and conclude that it was unduly suggestive.

Our second inquiry is to determine of witness Edgeton's identification of Kord was so unreliable under the totality of the circumstances that it created a very substantial likelihood of irreparable misidentification. Witness Edgeton's trial identification occurred several months after the robbery. She told law enforcement authorities at the robbery scene that after the two robbers left the

building, she observed one of them as he went past the drive-up teller window. She saw his profile as he ran past the window and the man was not wearing a mask. When witness Edgeton testified, she stated that Kord resembled the man who ran past the teller window. Kord Br. at 7. Edgeton's identification of the defendant at the trial below was not overwhelmingly different than her observations on the robbery date. She did not make a positive identification on August 6, 1985 nor at trial. She merely testified that Kord resembled one of the robbers. The jury was able to weigh her inability to make a positive identification with other evidence heard at the trial. We do not find that

Edgeton's identification was so unreliable under the totality of the circumstances that it created a very substantial likelihood of irreparable misidentification. In fact, the defendant's trial counsel tried to use witness Edgeton's inability to make a positive identification of Kord to the defendant's advantage. In his closing argument, Kord's trial counsel stated, "She saw a profile, and that profile resembled him [Kord]. And you are going to convict Daniel Kord on that?" Kord Br. at 17.

Further, the reality is that there is substantial evidence beyond witness Edgeton's testimony to conclude that a reasonable jury would convict defendant

Kord. See our discussion supra. We reject any argument by Kord that the Edgeton identification testimony was the pivotal issue as to his conviction. there was no constitutional error in admitting the trial identification.

[5] Defendant Kord argues that pursuant to Fed.R.Crim.P. 14 the trial court erred when it did not allow his motion for severance. Kord stated in his motion that he thought co-defendant Mangum would submit testimony to the jury of Kord's innocence. The defendant's argument is based on a statement from Mangum to FBI Agent Leuck that an individual named "John" was his accomplice. Co-defendant Mangum used his Fifth Amendment privilege and

never testified.

In United States v. Bruun, 809 F.2d 397, 407 (7th Cir. 1987) this Court held that, "A refusal to grant a severance will be disturbed on appeal only if it results in manifest and substantial prejudice; in other words, it is reviewable only for abuse of discretion." The mere possibility of a co-defendant's testimony has been found to be insufficient grounds for severance. See United States v. Pavelski, 789 F.2d 485, 491 (7th Cir. 1986); see also United States v. Harris, 542, F.2d 1283, 1312-13 (7th Cir. 1976). Substantial prejudice has not been advanced by Kord. Therefore, the defendant's argument remains unsubstantiated. We see no abuse of

discretion. Further, it appears Mangum's testimony was exculpatory, further complicating Kord's efforts to demonstrate that substantial prejudice occurred from a failure to sever.

[6] Defendant Kord's final argument is that the trial court erred in refusing to ask particular questions proposed by defendant's counsel for the voir dire. In United States v. Thompson, 807 F.2d 585, 590 (7th Cir. 1986), this Court held,

> The court is not required to ask any particular questions proposed by counsel, United States v. Verkuilen, 690 F.2d 648, 660 (7th Cir. 1982), and is accorded broad discretion in conducting the voir dire. Ham v. South Carolina, 409 U.S. 524, 528, 93 S.Ct. 848, 851, 35 L.Ed.2d 46 (1973). As a general matter, voir dire ... need only provide "some basis for a reasonably knowledgeable exercise of the right of challenge

whether for cause or peremptory." (quoting United States v. Jackson, 542 F.2d 403, 413 (7th Cir. 1976)). See also United States v. Hasting, 739 F.2d 1269, 1273 (7th Cir. 1984).

In the instant case, Kord's counsel proposed that the following questions be asked during the voir dire:

> No. 22 Do any members of the jury panel think that the Defendant is guilty of the crime with which he is charged at this time?
>
> No. 24 Does any member of the panel feel that the Defendant must be guilty of something or he would not be on trial?

We note the trial court did ask the jury if any members of the panel had formed any conclusions in their minds as to the guilt of the defendant which would take the presentation of evidence to remove. Gov't Br. at 20. This question is not materially

different from the language proposed in defense counsel's questions Nos. 22 and 24.

> This court will not find a trial court abused its discretion in conducting voir dire where there is "sufficient questioning to produce, in light of the factual situation involved in the particular trial, some basis for a reasonably knowledgeable exercise of the right to challenge."

United States v. Hasting, 739 F.2d 1269, 1273 (7th Cir. 1984) (citing United States v. Martin, 507 F.2d 428, 432 (7th Cir. 1974)) (quoting United States v. Lewin, 467 F.2d 1132, 1137 (7th Cir. 1972)). There was no deficiency in the questions posed in the instant case, since they clearly permitted the knowledgeable exercise of for cause or peremptory challenges. The trial court's questions to the jury enunciated above addressed the same basic concerns as

to bias as defendant's proposed voir dire questions. We find no abuse of discretion.

B. Defendant Mangum

[7] Defendant Mangum raises two issues on appeal. The first is that Mangum's oral confession was obtained in violation of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In Connecticut v. Barrett, ____ U.S. ___, 107 S.Ct. 828, 831, 93 L.Ed.2d 920 (1987) the Supreme Court held, "The fundamental purpose of the Court's decision in Miranda was 'to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process.'" (quoting Miranda,

384 U.S. at 469, 86 S.Ct. at 1625 (emphasis in original)). See also Colorado v. Spring, ___ U.S. ___, 107 S.Ct. 851, 856, 93 L.Ed.2d 954 (1987). The Court also held that, "Nothing in our decisions, ... or in the rationale of Miranda, requires authorities to ignore the tenor or sense of a defendant's response to [Miranda] ... warnings." Barrett, 107 S.Ct. at 831. In Barrett, the defendant refused to give a written statement unless his attorney was present, even though he "had no problem in talking about the incident." Id. at 830. The Supreme Court held that the defendant had not invoked his right to counsel for all purposes, and that he acquiesced to the oral interrogation. Id. AT 832.

In the present case, FBI Agent Leuck asked Mangum if he could read, write and

understand English. The defendant replied affirmatively. Mangum was given a Miranda Advice of Rights form to read. After Mangum read the form he was asked to sign it. The defendant replied, "No, I never sign anything." Mangum Br. at 9.

Agent Leuck cautioned Mangum, "We want to make sure you understand." Id. Leuck then went on to verbally explain all of Mangum's Miranda rights. Gov't Br. at 25. The defendant was then asked, "Would you like to go ahead and talk with us without signing the form?" Mangum admits he told Leuck, "Sure, why not." Mangum Br. at 9. The defendant then gave an oral confession to his involvement in the robbery.

We rule Mangum confessed voluntarily.

The interviewing agent was not required to ignore the sense of defendant's response to the Miranda warnings. Furthermore, we believe Mangum's waiver was made with full awareness of both the nature of his rights to be abandoned and the consequences of his decision to abandon them.2

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2. Defendant Mangum contends that the waiver of his Miranda rights was tainted because he was a drug abuser. The defendant admits, however, that Agent Leuck testified that Mangum told Leuck on August 6, 1985 that he had not used drugs in a day or so. Furthermore, Agent Leuck testified that the defendant did not appear to be under the influence of drugs. Mangum Br. at 10. Sergeant Bill Myers of the Woodford County Sheriff's Department observed the Mangum interview and the defendant had ample opportunity to call him as a witness to substantiate his claim. Defendant Mangum chose not to do so and we find his allegation unconvincing.

In Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986) the Supreme Court held, "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." (quoting Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979)). Mangum was informed about his Miranda rights both verbally and in writing. Furthermore, there is no evidence that he was "threatened, tricked or cajoled" into this waiver. Miranda, 384 U.S. at 476, 86 S.Ct. at 1628. See also Colorado v. Connelly, 479 U.S.

____, ____, 107 S.Ct. 515, 523-24, 93 L.Ed.2d 473 (1986). Miranda gives a defendant a right to choose between speech and silence and Mangum chose to speak. See Barrett, 107 S.Ct. at 832.

In North Carolina v. Butler, 441 U.S. 369, 370-71, 99 S.Ct. 1755, 1756, 60 L.Ed.2d 286 (1979), the Supreme Court held that when an FBI agent had fully advised a suspect of his Miranda rights, gave him an Advice of Rights form to read and sign and told the suspect he neither had to speak nor sign the form, the suspect's inculpatory remarks were admissible as evidence despite the suspect's statement, "I will talk to you but I am not signing any form." Butler, 441 U.S. at 371, 99

S.Ct. at 1756. See also United States v. Boon San Chong, 829 F.2d 1572, 1574 (11th Cir. 1987). We find a similar situation in the case at bar. Mangum's Miranda argument is without merit.

[8] Defendant Mangum's final argument is that the trial court erred in admitting evidence of his prior conviction as proof of his guilt to the possession of a firearm by a convicted felon charge.3 The defendant relies upon Illinois case law

3. The import of Mangum's argument wanes upon noting that his two year sentence for possession of a firearm by a convicted felon runs concurrently with his twenty-five year armed robbery sentence. Nonetheless, Mangum's argument is without merit.

which holds that the only proper manner to prove a prior conviction is through documents which, at minimum, contain the following: (1) a caption; (2) the entry showing the return of the indictment in open court by grand jury; (3) the indictment and record of arraignment; (4) the impaneling of the jury or waiver of the jury; (5) the jury verdict; and (6) the final judgment of the court. See People v. Novak, 343 Ill. 355, 175 N.E. 551 (1931); see also People v. Robbins, 88 Ill.App.2d 447, 232 N.E.2d 302 (1967).

Assuming arguendo that the defendant's checklist were to be adopted by this Court, each "Certified Statement of Conviction" form offered by the government to the trial

court satisfies the checklist requirements. Each statement includes: (a) a caption identifying Mangum as the defendant; (2) an entry showing return of a grand jury indictment on November 21, 1975; (3) December 12, 1975; (4) a plea of guilty to armed robbery (thereby negating the need for a jury or jury verdict); and (5) the final judgment of Judge Frank J. Wilson on July 7, 1976 and August 4, 1976, respectively. Furthermore, each "Certified Statement of Conviction" form was signed by a person authorized to make certification; the Clerk of the Circuit Court of Cook County, Morgan M. Finley. Clerk Finley dated from numbers 75-7161 and 75-7162 on October 15, 1976. Mangum Br appendix at

5-8. The signed forms were public records and pursuant to Fed.R. of Evid. 902(4) they were properly admitted by the trial court as evidence of Mangum's prior conviction. There was no abuse of discretion by the trial court. Accordingly, the trial court's decision is

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 7, 1988

CORRECTED March 14, 1988

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	) Appeal from the United States District Court
No. 86-1329 vs.	) for the Central District of
DANIEL JOSEPH KORD, a/k/a DANIEL KIRKLAND and DANIEL ALLEN, Defendant-Appellant.	) Illinois, Peoria, Div. No.85-CR-10034 MICHAEL M. MIHM Judge

ORDER

On February 2, 1988, defendant-appellant Daniel Joseph Kord

filed a petition for rehearing. All the judges on the panel have voted to deny the petition. The petition is therefore DENIED.

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*Hon. William J. Campbell, of the Northern District of Illinois, sitting by designation.